Nos. 79-4, 79-5, and 79-491

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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JASPER F. WILLIAMS AND EUGENE F. DIAMOND, APPELLANTS

*v.*

DAVID ZBARAZ, et al.

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JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, APPELLANT

*v.*

DAVID ZBARAZ, et al.

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UNITED STATES OF AMERICA, APPELLANT

*v.*

DAVID ZBARAZ, et al.

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

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## BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-4

JASPER F. WILLIAMS AND EUGENE F. DIAMOND, APPELLANTS

*v.*

DAVID ZBARAZ, et al.

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No. 79-5

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, APPELLANT

*v.*

DAVID ZBARAZ, et al.

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No. 79-491

UNITED STATES OF AMERICA, APPELLANT

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**BRIEF FOR THE UNITED STATES**

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## OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-22a) is reported at 469 F. Supp. 1212.[1] The earlier opinions of the district court (J.S. App. 54a-73a, 91a) are not reported. The opinions of the court of appeals (J.S. App. 37a-53a, 74a-90a) are reported at 596 F.2d 196 and 572 F.2d 582.

## JURISDICTION

The final judgment of the district court (J.S. App. 23a-36a) was entered on April 30, 1979. Appellants in No. 79-4 filed a notice of appeal on May 2, 1979 (79-4 J.S. App. 9-13). Appellant in No. 79-5 filed a notice of appeal on May 8, 1979 (79-5 J.S. App. A56-A58). The United States filed a notice of appeal on May 25, 1979 (J.S. App. 92a-93a). The jurisdictional statements in Nos. 79-4 and 79-5 were filed on July 2, 1979. On July 18, 1979, Mr. Justice Stevens extended the time for docketing the appeal in No. 79-491 to and including September 22, 1979. The jurisdictional statement in No. 79-491 was filed on September 21, 1979. On November 26, 1979, this Court consolidated the cases and postponed further consideration of the question of jurisdiction until the hearing on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252. Further discussion of the Court's jurisdiction appears at pages 23-44, *infra*.

[1] Unless otherwise indicated, "J.S." and "J.S. App." refer to the jurisdictional statement and accompanying appendix in No. 79-491.



## QUESTION PRESENTED

Whether a legislative decision to permit the use of public funds for medically necessary services generally and for abortions necessary to preserve the life of the prospective mother but not for other "medically necessary" abortions violates the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in the appendix to this brief.

## STATEMENT

1. Title XIX of the Social Security Act, as amended, 42 U.S.C. 1396 *et seq.*, establishes a medical assistance program, commonly known as "Medicaid," under which the federal government provides financial assistance to those states that choose to reimburse the costs of medical treatment for needy persons. For a state to qualify for federal assistance under Title XIX, its Medicaid plan must include coverage for the "categorically needy" [2] for at least

[2] The "categorically needy" group includes families with dependent children eligible for assistance under the Aid to Families with Dependent Children program (42 U.S.C. 601 *et seq.*) and the aged, blind, and disabled eligible for benefits under the Supplemental Security Income program (42 U.S.C. 1381 *et seq.*). See 42 U.S.C. 1396a(a)(10)(A). The states may also choose to extend Medicaid coverage to other persons, termed the "medically needy," who would be eligible for

five general categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facility services, periodic screening and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. 1396a (a)(13)(B) and 1396d(a)(1)-(5).

The Act does not expressly require that participating states pay for the cost of abortions or any other particular medical procedures,[3] but the statute does provide that Medicaid beneficiaries must receive, at minimum, services within the categories specified above. A federal regulation under the Act provides that state Medicaid agencies "may not arbitrarily deny or reduce the amount, duration, or scope of a required service [*i.e.*, a service within any of the five mandatory categories] * * * to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. 440.230(c)(1), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978). With respect to the persons eligible for Medicaid benefits and the level of payments available, the Act

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AFDC or SSI payments if they did not have income or resources in excess of the statutory standards and who have insufficient income and resources to pay for necessary medical care. See 42 U.S.C. 1396a(a)(10)(C).

[3] Indeed, when Title XIX was added to the Social Security Act in 1965 (79 Stat. 343), most "medically necessary" abortions were illegal in most states. *Roe* v. *Wade*, 410 U.S. 113, 118 & n.2 (1973). This Court's rulings in *Wade* and its companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973), established the constitutional right of a woman to seek an abortion during the first trimester of pregnancy.



requires each state Medicaid plan to "include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX] * * *." 42 U.S.C. 1396a(a)(17)(A). An implementing regulation permits participating states to place reasonable limits on the amount of a particular kind of care that will be covered. 42 C.F.R. 440.230(b). The same regulation authorizes state agencies to "place appropriate limits on a service based on such criteria as medical necessity * * *." 42 C.F.R. 440.230(c)(2), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978).

In September 1976, Congress limited the availability of federal Medicaid funds to reimburse the cost of medically indicated or "therapeutic" abortions. Section 209 of Pub. L. No. 94-439, the appropriations act for the Department of Health, Education, and Welfare for fiscal year 1977, provided that "[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." 90 Stat. 1434. (This provision is commonly known as the Hyde Amendment, after its original congressional sponsor, Representative Henry J. Hyde of Illinois.) The following year, at least partially in response to the passage of the Hyde Amendment (see 79-5 J.S. 7), the Illinois legislature enacted similar measures designed to prohibit state medical assistance payments for abortions "unless, in the opinion of a physician, such procedures are neces-

sary for the preservation of the life of the woman seeking such treatment * * *." Ill. Ann. Stat. ch. 23, §§ 5-5, 6-1, 7-1 (Smith-Hurd 1979 Supp.). This limitation applies not only to the state's Medicaid program but also to two fully state-funded programs for persons ineligible to receive Medicaid benefits.[4]

2. In December 1977, within three weeks of the effective date of the new Illinois statute, two doctors whose medical practice includes performing abortions for indigent women filed this suit in the United States District Court for the Northern District of Illinois (A. 9-27). They proceeded on their own behalf and on behalf of all other "registered and licensed physicians in Illinois who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for medical services under the Illinois medical assistance programs" (A. 11).[5] Plain-

[4] The two Illinois medical assistance programs other than the Medicaid program are the General Assistance program, described in Ill. Ann. Stat. ch. 23, §§ 6-1 *et seq.* (Smith-Hurd 1968 and 1979 Supp.), and the Local Aid to the Medically Indigent program, described in Ill. Ann. Stat. ch. 23, §§ 7-1 *et seq.* (Smith-Hurd 1968 and 1979 Supp.).

[5] The other named plaintiff was the Chicago Welfare Rights Organization, a nonprofit Illinois corporation whose members include women dependent on Illinois medical assistance benefits and "for whom abortions have been and will be medically necessary" (A. 11). In April 1978, plaintiffs filed an amended pleading (A. 93-96), adding as plaintiffs Jane Doe and all other indigent, pregnant women in Illinois "for whom an abortion is medically necessary, but not necessary for the preservation of their lives, and who wish such abortions performed."



tiffs sought a declaration that the Illinois statute barring state medical assistance payments for any abortions except those necessary to preserve the life of a pregnant woman violates Title XIX of the Social Security Act and the Equal Protection Clause of the Fourteenth Amendment. They also sought to enjoin enforcement of the Illinois statute. Plaintiffs argued that the Medicaid Act requires the funding of medically necessary abortions even if the woman's life is not in danger. They further contended that, by imposing restrictions on the availability of funds for medically necessary abortions but not for other medically necessary operations, the Illinois statute impermissibly distinguishes among groups of indigent women in need of medical care.

3. On December 7, 1977, the day after this lawsuit was filed in the district court, Congress passed a joint resolution providing appropriations for HEW for the last 10 months of fiscal year 1978 and including a modified version of the Hyde Amendment to govern the availability of federal Medicaid funds for abortions during that period. Pub. L. No. 95-205, 91 Stat. 1460; 123 Cong. Rec. S19439-S19446,

The principal defendant was Arthur F. Quern, Director of the Illinois Department of Public Aid, the agency charged with administering the State's medical assistance programs. Two doctors, appellants in No. 79-4, intervened as defendants (J.S. App. 2a-3a, 56a-58a).

H12769-H12776, H12827-H12831 (daily ed. Dec. 7, 1977).[6] The modified Hyde Amendment listed two additional exceptions to the general prohibition against the use of appropriated funds for abortions. It stated:

> [N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

This revised version of the Hyde Amendment was repeated in the HEW appropriations act for fiscal year 1979 (Pub. L. No. 95-480, 92 Stat. 1586) and was the law in effect at the time each of the district court and court of appeals decisions in the present case was rendered and at the time the current appeals were docketed in this Court.

In large measure because the Senate and the House of Representatives could not agree on whether this modified approach to federal funding for abortions

[6] HEW appropriations for October and November 1977, the first two months of fiscal year 1978, were provided by joint resolutions that simply continued in effect the original version of the Hyde Amendment passed the previous year. Pub. L. No. 95-130, 91 Stat. 1153; Pub. L. No. 95-165, 91 Stat. 1323.



should be retained for fiscal year 1980, Congress was unable to enact a new annual appropriations bill for HEW by the October 1979 deadline (see J.S. 6 n.3). Instead, on October 12, 1979, Congress adopted a joint resolution providing appropriations for HEW for the period ending November 20, 1979, and deleting the third exception in the modified Hyde Amendment language originally enacted in December 1977. Pub. L. No. 96-86, 93 Stat. 659, 662; 125 Cong. Rec. H9075-H9082, S14491-S14497 (daily ed. Oct. 12, 1979). The new appropriations measure stated:

> [N]one of the Federal funds provided by this joint resolution * * * shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service.

After further debate, the same language was included in another joint resolution adopted by Congress on November 16, 1979, making appropriations for HEW for the remainder of fiscal year 1980. Pub. L. No. 96-123, 93 Stat. 925, 926; 125 Cong. Rec. S16882-S16885, H10953-H10960 (daily ed. Nov. 16, 1979). Thus, the currently effective statutory limitation on the use of federal Medicaid funds for abortions is somewhat different from that in effect when this lawsuit was filed (because of the addition of the "rape or incest" exception) and also from the version that governed at the

time of the decisions below (because of the deletion of the "severe and long-lasting physical health damage" exception).[7]

4. In response to appellees' challenge to the Illinois statute restricting the availability of state medical assistance payments for abortions, the district court initially announced its intention to abstain from considering the complaint until the Illinois state courts had construed the challenged legislation (J.S. App. 91a).[8] The court of appeals reversed, concluding that abstention was inappropriate under all the circumstances, and remanded for consideration of appellees' motion for preliminary injunctive relief and for further proceedings (*id.* at 74a-90a). On remand, the district court certified two plaintiff classes in accordance with the requests filed by the plaintiff doctors at the time of the original complaint and by the plaintiff indigent pregnant women at the time of the April 1978 supplemental pleading (see page 6 and note 5, *supra*; A. 1, 3; J.S. App. 58a-62a).

The district court held that Title XIX of the Social Security Act and the regulations thereunder require

[7] The recent change in the provisions of the Hyde Amendment does not affect the constitutional questions presented in this case (see pages 50-51, *infra*). The revision does, however, render it unnecessary for this Court to decide the statutory question presented by appellants in No. 79-4 (see pages 38-44, *infra*).

[8] The district court apparently believed that the state statute's reference to medical procedures "necessary for the preservation of the life of the woman" might be construed to include all those abortions that appellees would label "medically necessary."



participating states to provide funding for all "therapeutic" or "medically necessary" abortions (J.S. App. 62a-67a). The court ruled that the modified version of the Hyde Amendment in effect in May 1978 was only a limitation on the use of federal funds and did not change the substantive requirements of the Medicaid Act (*id.* at 66a). Accordingly, the court permanently enjoined the enforcement of the Illinois statute to the extent it would have denied payments for abortions that are "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health" (*id.* at 66a-67a). Without stating its reasons for doing so, the district court applied its injunction to all three Illinois medical assistance programs (*ibid.*), even though, of course, only the State's Medicaid program is subject to the requirements of the federal Medicaid Act.

The court of appeals again reversed (J.S. App. 37a-53a). Following the decision of the First Circuit in a similar challenge to the Massachusetts abortion funding law,[9] the court ruled that the Hyde Amendment "alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment" (*id.* at 42a-43a). The court remanded with instructions that the permanent injunction previously entered by the district court be

[9] *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121 (1st Cir.), cert. denied, No. 78-1430 (May 14, 1979).

modified to require payments only "for those abortions fundable under the Hyde Amendment" (*id.* at 51a). The court of appeals also directed the district court to rule expeditiously on the constitutional questions it had not reached. In particular, the court of appeals stated (*id.* at 50a-51a; footnote omitted) that the district court should consider

> whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment in view of the facts that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right.[10]

[10] The court of appeals, perhaps accurately but without explanation, implicitly assumed that its statutory ruling would not cause Illinois to withdraw from the Medicaid program but that the State would prefer to continue its participation in the program on the condition that it provide payments for all abortions for which federal reimbursement is available under the Hyde Amendment. The court of appeals also concluded that the modified injunction requiring state payments for abortions fundable under the Hyde Amendment should apply to all three Illinois medical assistance programs, not just the Medicaid program (J.S. App. 51a-53a). Relying on a statement in the State's brief, the court found that the challenged Illinois Medicaid statute was intended to represent the State's understanding of the congressional purpose reflected in the original Hyde Amendment (*id.* at 52a & n.21). In light of this legislative background and the representation that "the vast majority of publicly funded abortions would come under the [Illinois] Medicaid plan rather than the purely state plans," the court expressed doubt that "the General Assembly would have imposed standards for funding from state plans which differ from the standards for Medicaid



5. On the second remand, the district court advised the Attorney General of the United States that the constitutionality of an Act of Congress had been drawn into question, and the United States intervened to defend the constitutionality of the Hyde Amendment, as it stood at the time (79-5 J.S. App. A19-A20). The district court observed (J.S. App. 5a-6a n.3) that the court of appeals had directed it "to pass on the constitutionality of the Hyde Amendment, even though plaintiffs attack only the legality of an Illinois statute." The court expressed some misgivings about the correctness of this procedure but remarked that the same reasoning that would govern the validity of the Illinois statute would also determine the outcome with respect to the Hyde Amendment (*ibid.*):

> Although we are not persuaded that the federal and state enactments are inseparable and would hesitate to inject into the proceeding the issue of the constitutionality of a law not directly under attack by plaintiffs, we are obviously constrained to obey the Seventh Circuit's mandate. Therefore, while our discussion of the constitutional questions will address only the Illinois statute, the same analysis applies to the Hyde

funding" (*id.* at 52a). The court also declared that "resolution of the constitutional issues will apply equally to the state-funded and the Medicaid-funded plans" (*id.* at 53a). For all these reasons, the court held that "the various provisions of the [1977 state] law should not be severed and that the modified injunction should apply to all publicly funded abortions [in Illinois]" (*ibid.*).

Amendment and the relief granted will encompass both laws.

The district court held that the Hyde Amendment and the Illinois statute are unconstitutional to the extent that they deny funding for "medically necessary abortions prior to the point of fetal viability" (J.S. App. 21a, 24a-27a). The court determined on the basis of doctors' affidavits that "[m]ost health problems associated with pregnancy would not be covered" even by the comparatively liberal second version of the Hyde Amendment and "those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother" (*id.* at 17a). The court inferred that if Medicaid funds are available only for those abortions covered by the Hyde Amendment, "[t]he effect * * * will be to increase substantially maternal morbidity and mortality among indigent pregnant women" (*ibid.*). In addition, the court observed that the Hyde Amendment criteria "completely ignore the very serious threats to an indigent pregnant woman's psychological or psychiatric health that may make an abortion medically necessary" (*id.* at 17a-18a n.11). The court concluded (*id.* at 20a) that

> a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective interests involved" shift, thereby legitimizing the state's interest. After that point, therefore, * * * a state may withhold funding for medically necessary abortions that are not life-preserving, even though it funds all other medically necessary operations.



Accordingly, the court enjoined defendant Quern from enforcing the Illinois statute to deny payment under the state medical assistance programs for "medically necessary abortions performed prior to fetal viability" (*id.* at 27a). The court did not enjoin any action by the United States.[11]

## SUMMARY OF ARGUMENT

### I

A. This Court has jurisdiction over these appeals because the requirements of 28 U.S.C. 1252 are satisfied. The district court has held an Act of Congress unconstitutional in a civil suit to which the United States is a party (by virtue of its intervention under 28 U.S.C. 2403).

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[11] The district court refused to stay its order, and defendant Quern and the intervening doctors moved in this Court for a stay pending appeal (Nos. A-958 and A-967). On May 24, 1979, Mr. Justice Stevens denied the motions on the ground that the likely irreparable injury to the plaintiffs in the event a stay were granted outweighed the injury that the State would suffer if the district court's decision were permitted to remain in effect pending appeal. The intervening doctors then applied for a stay to Mr. Justice Rehnquist. He referred the application to the Court, which denied it on June 4, 1979.

B. The district court lacked jurisdiction to decide the constitutionality of the Hyde Amendment, because no party attacked the validity of the federal statute and appellees could have been awarded all the relief they sought solely on the basis of the district court's ruling with respect to the challenged Illinois law. Insofar as the constitutionality of an Act of Congress was concerned, therefore, appellees' complaint presented no case or controversy sufficient to permit an exercise of the judicial power conferred by Article III of the Constitution. Although the district court's lack of authority to rule on the Hyde Amendment does not deprive this Court of appellate jurisdiction under Section 1252 (see *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975)), it does mean that the Court should not address the merits of the district court's decision on the federal statute, but instead should vacate that portion of the judgment concerning the Hyde Amendment.

C. In circumstances where the Court determines that a district court lacked jurisdiction to declare an Act of Congress unconstitutional, we believe that the Court ordinarily should not proceed to decide the remaining questions presented on appeal, even though *McLucas* indicates that it would have the power to do so. When a direct appeal is taken to this Court only because a district court improperly addressed the constitutionality of a federal statute, it should not provide the occasion for the Court to resolve other questions that by themselves could not justify an exercise of appellate jurisdiction under Section 1252.



See, *e.g.*, *FHA* v. *The Darlington, Inc.*, 352 U.S. 977 (1957) (not considering question of statutory and contract interpretation after concluding that three-judge district court was required to rule on constitutionality of federal statute). This general rule seems especially appropriate where, as here, there is no case or controversy regarding the question on which the appeal is based, and hence this Court, like the court below, lacks power to decide the merits of the constitutional question whose prompt resolution Congress thought desirable. In such a situation it would be peculiar if the Court were to rule solely on other issues in the case not deserving of such special judicial attention.

Notwithstanding these general principles, this case is one in which the Court should decide the remaining questions presented on appeal, even if it concludes that the constitutionality of an Act of Congress is not directly in dispute. The Illinois funding restrictions applicable to medically necessary abortions raise important social and legal questions that warrant resolution by this Court. The validity of the state statute turns on precisely the same constitutional considerations that govern the validity of the Hyde Amendment. Moreover, the competing considerations have been canvassed in several lower court opinions and have been fully briefed in this Court. A delay would only postpone the consideration on the merits that appears inevitable and would thereby contribute to further repetitive litigation in the lower federal courts.

D. Although this Court's decisions establish that a proper appeal under Section 1252 brings "the whole case" before the Court, that phrase does not comprehend questions not decided by or comprised within the judgment under review. In an appeal under Section 1252, the Court may consider any matters resolved by the judgment below and any alternative grounds on which that judgment could be supported. See, *e.g.*, *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975). This does not mean, however, that the Court may properly consider every question previously decided by any court in the history of a given litigation. In particular, the statutory question presented by appellants in No. 79-4 is not open to review on these appeals. The question whether the Medicaid Act requires participating states to pay for all medically necessary abortions for which federal reimbursement is available was finally resolved by the court of appeals in February 1979, and that court's affirmative answer was simply assumed by the district court in rendering its constitutional decision. Appellants in No. 79-4 did not seek review of the court of appeals' ruling, and they cannot use these appeals as a means by which to obtain further consideration of a question that has no bearing on the correctness of the judgment now before the Court.

In any event, the recent change in the Hyde Amendment has effectively mooted the statutory question presented in No. 79-4. There is now only one category of abortions—abortions for the victims of promptly reported rape or incest—for which federal



funds are available but state funding would be denied under the Illinois statute. No plaintiff has explicitly asserted an interest in compelling Illinois to pay for such abortions, and the State itself has never sought review of the court of appeals' holding that it must pay for all abortions for which federal monies are available. Under these circumstances, the Court should not consider the question of statutory interpretation presented in No. 79-4.

## II

The court of appeals correctly held that the Medicaid Act imposes no obligation on participating states to fund medical procedures for which federal financial assistance is not available. The federal statute establishes a cooperative program for providing medical services to the needy; the primary feature of that program is joint federal-state funding. When Congress has refused to expend federal monies for a particular service, even one that would otherwise be covered by the Act, states are not required, as a condition of their continuing participation in the program, to assume full financial responsibility for the care or treatment abandoned by Congress.

This interpretation of the Medicaid Act is fully consistent with the legislative history of the Hyde Amendment. As the court of appeals observed (J.S. App. 46a), the Members of Congress who debated the several versions of the Hyde Amendment understood that the Amendment, by withholding federal funds for certain abortions, would relieve participating states of whatever statutory obligation they might

otherwise have had to pay for such abortions. For this reason, the Illinois law, to the extent it denies payment for abortions that the federal government will not fund as a result of the Hyde Amendment, does not violate the Medicaid Act.

## III

A. The recent legislative change in the provisions of the Hyde Amendment does not affect the constitutional arguments that control in this case. Accordingly, the Court need not defer ruling on the validity of the Illinois statute until the district court has had an opportunity to consider the impact of the congressional revision of the Amendment for fiscal year 1980. The district court held that neither the federal nor the state government can properly refuse Medicaid funding for medically necessary abortions prior to fetal viability. The current version of the Hyde Amendment is somewhat more restrictive than that reviewed by the district court, and hence the court's reasoning would apply fully to the legislation now in force. On the other hand, if Illinois and the federal government are correct in believing that the legitimate legislative interest in encouraging childbirth provides a rational explanation for the abortion funding limitations contained in the 1979 version of the Hyde Amendment, that same interest will support the more restrictive measure.

B. In *Maher* v. *Roe*, 432 U.S. 464 (1977), the Court held that legislative decisions to limit the availability of public funds for abortions must be sustained if they bear a rational relationship to a legitimate government purpose. Restrictions on the amount of public monies earmarked for the performance of a particular medical service do not impinge on any "fundamental right" or establish any "suspect classification" that would warrant strict judicial scrutiny. The Constitution does not require the state or federal government to pay for pregnancy-related medical services for indigent women or, indeed, to pay for any medical expenses for indigents. As a consequence, Congress and the state legislature are free, in distributing publicly-funded medical assistance, to draw distinctions among different services and forms of treatment, as long as there is some rational basis for the legislative judgment. This constitutional standard does not change merely because a legislature chooses to distinguish among medically necessary services rather than between such services generally and one or more "elective" procedures, such as nontherapeutic abortions.

C. The Hyde Amendment and the Illinois statute challenged in this case are rationally related to two legitimate legislative concerns: the desire to encourage childbirth and to protect the potentiality of human life, and the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. As this Court has observed, the federal and state governments have an "important and legitimate interest in protecting the potentiality of human life." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). This interest exists, not only after fetal

viability, but "throughout the course of the woman's pregnancy." *Beal* v. *Doe*, 432 U.S. 438, 446 (1977). In deciding whether to appropriate public funds for abortions, a legislature may appropriately weigh its interest in the potential life of the fetus against the competing interest in protecting maternal health. Congress and the Illinois General Assembly have considered these disparate interests and have concluded that, except where the mother's life would be endangered by carrying the pregnancy to term, the interest in encouraging childbirth and preserving fetal life should prevail. This legislative choice is rational.

The district court's decision to the contrary merely reflects disagreement with the weights assigned to the competing values by Congress and the state legislature. During the period before fetal viability, the district court would assign greater relative significance to the interest in maternal health than either legislative body thought proper. To be sure, a reviewing court may question the wisdom of this legislative action and may even conclude, as a policy matter, that a different course would have been preferable. But a judgment of this kind is not a sufficient reason for invalidating the considered policy decision of the elected representatives of the public. "[W]hen an issue involves policy choices as sensitive as those implicated [here] * * *, the appropriate forum for their resolution in a democracy is the legislature." *Maher* v. *Roe, supra*, 432 U.S. at 479.

The federal and state governments may legitimately treat abortion differently from other medically necessary services because only abortion involves the termination of a potential human life. *Maher* v. *Roe, supra*, 432 U.S. at 480. This Court has specifically acknowledged that "not all distinction between abortion and other procedures is forbidden." *Bellotti* v. *Baird*, 428 U.S. 132, 149 (1976). Whether an abortion is sought before or after fetal viability, the special characteristics of the procedure provide a rational basis for the imposition of funding restrictions not applicable to other medical services.



## ARGUMENT

### I

### THIS COURT HAS JURISDICTION OVER THE PRESENT APPEALS UNDER 28 U.S.C. 1252, BUT THE DISTRICT COURT LACKED AUTHORITY TO DECIDE THE CONSTITUTIONALITY OF A FEDERAL STATUTE ABOUT WHICH THERE WAS NO CASE OR CONTROVERSY AMONG THE PARTIES

The first jurisdictional question raised by appellees concerns the propriety of the district court's decision, following the instructions issued by the court of appeals, to adjudicate the constitutionality of the Hyde Amendment.[12] See Motion to Vacate in Part, to Dismiss in Part, and to Affirm 6-9. Appellees do not contend that this Court lacks jurisdiction over the present appeals under 28 U.S.C. 1252. They argue

[12] Unless otherwise indicated, references to the Hyde Amendment in the remainder of this brief denote the version of the Amendment in effect from December 1977 until October 1979.

only that this Court should not resolve the validity of the Hyde Amendment, because that question was not raised by the parties in the district court and because the district court's ruling on the federal statute was not necessary to its judgment regarding the Illinois statute. Appellees further assert (Motion to Vacate 8-9 n.**) that, despite the absence of a case or controversy over the constitutionality of the Hyde Amendment, the appeals from the district court's ruling on that question confer jurisdiction on this Court to review the remaining aspects of the judgment below, even though the district court's decision on the Illinois statute alone could not have been appealed directly to this Court. Finally, appellees contend (Motion to Vacate 25-33) that these appeals do not properly present the statutory interpretation question raised by appellants in No. 79-4 (79-4 J.S. 23-25) and decided by the court of appeals (J.S. App. 37a-53a) prior to the district court's constitutional ruling.

We agree with appellees' assertions concerning the Court's jurisdiction over the constitutional aspects of the case and also with their conclusion that the Court should not address the statutory question raised in No. 79-4. Not only does the Court lack jurisdiction over the latter question, but congressional revision of the Hyde Amendment since the district court's judgment has effectively mooted the issue, at least as far as this lawsuit is concerned.



**A. The Jurisdictional Requirements for an Appeal Under 28 U.S.C. 1252 Are Satisfied in This Case**

The starting point for any discussion of the Court's jurisdiction in this case is the language of 28 U.S.C. 1252. That statute authorizes any party to appeal to this Court "from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States * * * is a party."

These requirements plainly are satisfied here. The final judgment of the district court held the Hyde Amendment, an Act of Congress, unconstitutional. The judgment was rendered in a civil suit to which the United States was a party by virtue of its intervention in accordance with 28 U.S.C. 2403(a).[13]

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[13] Section 2403(a) provides:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

When appellants in Nos. 79-4 and 79-5 applied to this court for a stay of the district court's judgment (see note 11, *supra*), appellees responded in part by suggesting that, when the United States intervenes in accordance with Section

Hence, this Court has jurisdiction over these appeals under Section 1252. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 30-31 (1975).

**B. The District Court's Judgment Should be Vacated to the Extent It Invalidates the Hyde Amendment, Because There Is No Case or Controversy Among the Parties With Respect to the Federal Statute**

A substantial question remains, however, concerning the district court's power to decide the constitutionality of the Hyde Amendment in this case. It is settled that this Court's appellate jurisdiction under 28 U.S.C. 1252 is not defeated because the court from which the appeal is taken lacks jurisdiction to pass on the validity of the federal statute involved. Appeal to this Court is proper under Section 1252 even if the lower federal court that holds an Act of Congress unconstitutional is without power to do so. *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31-32. The question of the lower court's jurisdiction *vel non* is, however, quite relevant to the proper disposition of the case, once an appeal has been taken to this Court. For example, the Court has held that, if a

2403(a), it does not become a party for purposes of the jurisdictional requirement in 28 U.S.C. 1252. See Memorandum In Opposition to Appellants' Application for a Stay 8. Appellees have not repeated this argument in response to the jurisdictional statements filed in this Court, and in any event the contention is without merit. See *Fleming* v. *Rhodes*, 331 U.S. 100, 103 (1947); R. Stern and E. Gressman, *Supreme Court Practice* 77 (5th ed. 1978); C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 4037, at 56-57 (1978); 9 *Moore's Federal Practice* ¶ 110.03[5], at 95-96 & n.2 (2d ed. 1975).



single district judge has invalidated a federal statute in a case in which a three-judge district court should have been convened, the Court will, on appeal under Section 1252, vacate the judgment below and remand the case for consideration by a three-judge district court. *FHA* v. *The Darlington, Inc.*, 352 U.S. 977 (1957); *Flemming* v. *Nestor*, 363 U.S. 603, 606-607 (1960). Thus, although an appeal in such circumstances is proper under Section 1252,[14] the Court ordinarily will refuse to review the merits of a decision that the lower court lacked power to render under the Constitution or applicable jurisdictional statutes.

This principle should control the Court's disposition of the district court's ruling on the validity of the Hyde Amendment. Appellees have steadfastly maintained,[15] and the district court agreed (J.S. App. 5a-6a n.3), that at no time in this lawsuit have they or any other party challenged the constitutionality of the federal statute. Appellees' complaint and all their arguments in the district court and the court of appeals have been addressed solely to the Illinois statute limiting payments for abortions under the state medi-

[14] Indeed, a direct appeal under Section 1252 is the exclusive appellate remedy in such circumstances, because 28 U.S.C. 1291 provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court."

[15] See Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction 3 & n.* (Mar. 22, 1979); Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment and for an Injunction 1 n.* (Apr. 3, 1979); 79-64 Pet. 25-26; Motion to Vacate 6-7.

cal assistance programs. Even after the court of appeals injected the Hyde Amendment issue into the case and instructed the district court to consider the Amendment's validity, appellees did not seek to amend their complaint to obtain relief against the federal statute. Indeed, appellees insisted in the district court on remand that they sought "no relief with respect to the Hyde Amendment, or against any federal official" and that "nothing in [their] claim for relief require[d] th[e] [c]ourt to decide the constitutionality of the Hyde Amendment." Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction 3 & n.* (Mar. 22, 1979). Appellees explicitly stated that the only relief they sought was a "judgment that the Illinois abortion funding policy violates the Fourteenth Amendment, and an injunction requiring state funding of all therapeutic abortions under the Illinois medical assistance program" (*id.* at 3).[16]

To be sure, as appellees and the district court acknowledged, the same reasoning that supports appellees' attack on the constitutionality of the Illinois law also applies to the Hyde Amendment. But the fact remains that the Hyde Amendment was not the subject of appellees' grievance, and they could have been awarded all the relief they sought without any judicial ruling on the validity of the federal statute. The court of appeals in the present case therefore

[16] See Memorandum in Support of Plaintiffs' Motion for Summary Judgment and for an Injunction 3 & n.* (Mar. 22, 1979); J.S. App. 6a n.3.



erred in instructing the district court to adjudicate the validity of a federal law about which there was no dispute among the parties. The judicial power of the federal courts under Article III of the Constitution extends only to actual cases and controversies, and the district court, accordingly, lacked authority to render a judgment and advisory opinion on the constitutionality of the Hyde Amendment. Thus, to the extent that the court's decision purports to review the validity of the Hyde Amendment and pass on its merits, the judgment should be vacated. See, *e.g.*, *C.I.O.* v. *McAdory*, 325 U.S. 472 (1945); *United States* v. *Johnson*, 319 U.S. 302 (1943); *Muskrat* v. *United States*, 219 U.S. 346 (1911).

### C. This Court Should Review the Remainder of the District's Court's Judgment, Even Though That Judgment is Appealable Under Section 1252 Only Because The District Court Mistakenly Decided A Question As to Which There Was No Case or Controversy

If, as we have argued above, the Court must vacate the district court's judgment holding the Hyde Amendment unconstitutional because of the absence of a case or controversy, the critical jurisdictional question then becomes whether the Court should proceed to review the remaining aspects of the decision below or whether it instead should remand the case for whatever further proceedings might be appropriate (*e.g.*, an appeal to the court of appeals).[17]

[17] Appellants in Nos. 79-4 and 79-5 and appellees all filed timely notices of appeal to the court of appeals in May 1979. Appellants in No. 79-4 filed their notices of appeal to this

The general rule established by this Court's decisions is that a proper appeal under 28 U.S.C. 1252 brings "the whole case," not just the part involving the constitutionality of an Act of Congress, before the Court. *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31-32; *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 n.13 (1975); *United States* v. *Raines*, 362 U.S. 17, 27 n.7 (1960). See R. Stern and E. Gressman, *Supreme Court Practice* 78 (5th ed. 1978); C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4037, at 52 (1978); 9 *Moore's Federal Practice* ¶ 110.03[5], at 96 (2d ed. 1975). The implication of this rule is that, once a proper appeal has been taken under Section 1252, this Court may review

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Court and the court of appeals on the same day. Appellant in No. 79-5 filed his notice of appeal to the court of appeals on May 21, 1979, several days after his notice of appeal to this Court had been filed. The effectiveness of the notices of appeal to the court of appeals may be problematical because of the last two sentences of 28 U.S.C. 1252, which provide:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

If this Court decides that it should not reach those aspects of the district court's judgment not dealing with the constitutionality of the Hyde Amendment, it would be appropriate to remand for the entry of a fresh decree addressed only to the validity of the Illinois statute. This action would enable the parties to appeal the new district court order to the court of appeals and would eliminate any question about the timeliness of their earlier notices that review would be sought in the Seventh Circuit. See *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972).



all facets of the decision below, even if the precise portion of the challenged ruling that supports the Court's appellate jurisdiction was beyond the power of the lower court to render.

This line of reasoning entails a substantial difficulty because it means not only that the Court can decide questions on appeal (and perhaps, as here, on direct appeal from a district court) even though those questions by themselves could not justify an invocation of the Court's appellate jurisdiction, but also that the Court can do so solely because a lower federal court has erroneously concluded that it should address the constitutionality of a federal statute. Indeed, this Court's references to its power to review "the whole case" on appeal under Section 1252 might even suggest that the Court should routinely decide the remaining questions in a direct appeal even where (as here) it lacks power (because of Article III limitations) to resolve the validity of an Act of Congress on the merits.

Appellees assert (Motion to Vacate 8-9 n.**), without any mention of this problem, that "when remaining issues are sufficient to make the case justiciable, the Court retains jurisdiction to pass upon them, even where the issues deemed not justiciable are the ones upon which this Court's jurisdiction was originally invoked." The two cases cited by appellees in support of this proposition, however, are inapposite. In *United States* v. *Raines*, *supra*, 362 U.S. at 27-28, the Court did not suggest that the district court had improperly addressed the constitutional issue that formed the

basis of the government's appeal. Moreover, it does not appear that, in reversing the district court's constitutional ruling in that case, this Court also considered other questions that by themselves could not have been raised on appeal. In *Farmers & Mechanics National Bank* v. *Wilkinson*, 266 U.S. 503 (1925), the Court simply held that it lacked appellate jurisdiction and therefore dismissed the appeal; it did not decide any question on the merits.

We have been unable to find any decision in which the Court has explained the appropriate manner of disposing of the remaining questions on appeal once the Court has concluded that, for jurisdictional reasons (such as the absence of a case or controversy about the validity of an Act of Congress), the district court or the court of appeals should not have addressed the constitutional question that is the basis of an appeal under Section 1252. The precedent most nearly on point is *McLucas* v. *DeChamplain*, *supra*. There, the Court ruled first that it had appellate jurisdiction under Section 1252 whether or not the single-judge district court had jurisdiction to enter the challenged preliminary injunction. The Court then vacated the injunction and dismissed plaintiff's constitutional claim on the merits, without deciding whether a single district judge, or only a three-judge district court, could properly have entered the injunction sought by the plaintiff. The Court also resolved an additional question regarding the proper scope of the plaintiff's access to records and documents from an earlier court-martial proceeding (421 U.S. at 33-



34), even though that question by itself could not have been grounds for a direct appeal.

*McLucas* is distinguishable from the present case in at least two ways: (1) it involved a close question regarding the district court's jurisdiction, the answer to which would have been clear if the case had arisen later, after a decision of this Court that was announced between the time of the district court's injunctive order and this Court's subsequent review in *McLucas*;[18] here, by contrast, the lack of an Article III case or controversy regarding the Hyde Amendment is reasonably plain and not complicated by other litigation; and (2) the jurisdictional defect affecting the district court's preliminary injunction

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[18] Relying on an earlier court of appeals' decision then pending on appeal to this Court, the single-judge district court in *McLucas* issued a preliminary injunction on the theory that the unconstitutionality of the challenged statutory provision was sufficiently clear that the convening of a three-judge district court was not necessary under 28 U.S.C. (1970 ed.) 2282. See *Bailey* v. *Patterson*, 369 U.S. 31 (1962). While the district court's preliminary injunction in *McLucas* was pending on appeal to this Court, the Court reversed the court of appeals' decision on which the district court had relied. *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974), rev'g 477 F.2d 1237 (D.C. Cir. 1973). Appellee in *McLucas* then argued that this Court's decision in *Avrech* demonstrated that the constitutional question presented to the district court in *McLucas* was not sufficiently clear to be decided by a single judge under *Bailey* and that, since a three-judge district court should have been convened, this Court lacked appellate jurisdiction under Section 1252. The Court disagreed and, following *Avrech*, dismissed appellee's complaint on the merits without deciding whether the single judge had jurisdiction to enter the preliminary injunction.

in *McLucas*, if there was one, was the product of highly technical statutes governing three-judge district courts (cf. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974)); here, the jurisdictional defect in the district court's judgment regarding the Hyde Amendment stems from the Article III preclusion of judicial power to decide questions in the absence of an actual case or controversy. Unlike the possible jurisdictional problem in *McLucas*, the jurisdictional defect in the present case applies to this Court as well as the district court; in the absence of a case or controversy, this Court is no more authorized to decide the constitutionality of the Hyde Amendment than was the court below.

The most that can be gleaned from *McLucas*, then, is that this Court *is empowered* to review the merits of additional questions presented on appeal from constitutional rulings rendered by lower federal courts without jurisdiction to address the validity of a federal statute. The case does not establish that in every instance the Court *should* decide such additional questions. Indeed, as a general rule, we believe that the better approach is the contrary. When, on direct appeal of a judgment of a district court under Section 1252, this Court determines that an error in the court below precludes consideration of the constitutionality of an Act of Congress, the rationale for congressional authorization of such appeals disappears. Under such circumstances, any remaining questions decided by the district court should ordinarily be left for another day. Either such matters can be reviewed initially in



the court of appeals (to which an appeal could have been taken if the district court had not addressed the constitutionality of a federal statute), or they can return to this Court together with the constitutional question once the defects in the district court's resolution of the latter have been cured. This approach would serve the dual purposes of limiting the exercise of this Court's jurisdiction under Section 1252 to those cases for which it was intended and avoiding the splitting of appeals in cases in which a federal statute is invalidated.[19]

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[19] *FHA* v. *The Darlington, Inc., supra*, provides an example of the appropriate procedure. In that case, plaintiff challenged the constitutionality of an Act of Congress. The Federal Housing Administration defended the statute but also presented a statutory argument the acceptance of which would have made it unnecessary to reach the constitutional question. A single-judge district court rejected the FHA's statutory argument, held the challenged statute unconstitutional, and enjoined its operation. The FHA appealed to this Court and presented three reasons why the district court's judgment was erroneous: (1) the statutory argument; (2) the constitutional argument; and (3) the argument that it was improper for a single-judge district court to enter an injunction against the operation of a federal law. This Court agreed that a three-judge district court should have been convened; it therefore reversed the judgment of the single judge and remanded for further proceedings. 352 U.S. 977. The Court did not consider the FHA's statutory argument at that time, even though it presumably had jurisdiction to do so under the "whole case" doctrine. On remand, the three-judge district court adhered in substance to the conclusions reached earlier by the single judge. The FHA again took a direct appeal, and this Court then reviewed both the statutory and the constitutional issues. 358 U.S. 84 (1958).

Notwithstanding these salutary general principles, however, we believe that the present case is one in which the Court should proceed to decide the remaining questions raised by the district court's judgment, even if it is not obligated to do so. The constitutionality of the Illinois statutory limitations on public funding for "medically necessary" abortions is a significant federal question that deserves resolution by this Court. Similar measures have been enacted in several other states, and, together with the federal statute, they have provoked substantial litigation in the federal courts. See, *e.g.*, *Califano* v. *McRae*, 433 U.S. 916 (1977), vacating and remanding 421 F. Supp. 533 (E.D. N.Y. 1976); *Hodgson* v. *Board of County Commissioners*, No. 79-1665 (8th Cir. Jan. 9, 1980); *Reproductive Health Services* v. *Freeman*, No. 79-1275 (8th Cir. Jan. 9, 1980); *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121 (1st Cir.), cert. denied, No. 78-1430 (May 14, 1979); *Doe* v. *Kenley*, 584 F.2d 1362 (4th Cir. 1978); *Women's Health Services, Inc.* v. *Maher*, Civ. No. H-79-405 (D. Conn. Jan. 7, 1980); *Planned Parenthood Affiliates* v. *Rhodes*, 477 F. Supp. 529 (S.D. Ohio 1979); *Doe* v. *Busbee*, 471 F. Supp. 1326 (N.D. Ga. 1979); *Baird* v. *King*, Civ. No. 79-1132-N (D. Mass. Oct. 11, 1979); *Doe* v. *Percy*, No. 79-C-367 (W.D. Wis. Sept. 13, 1979); *Roe* v. *Casey*, 464 F. Supp. 487 (E.D. Pa. 1978); *Woe* v. *Califano*, 460 F. Supp. 234 (S.D. Ohio 1978); *D—— R——* v. *Mitchell*, 456 F. Supp. 609 (D. Utah 1978), appeal pending, No. 78-1675 (10th Cir.); *Smith* v. *Ginsberg*, No. 75-0380 CH (S.D. W. Va. May 9, 1978); *Doe* v.



*Mundy*, 441 F. Supp. 447 (D. Wis. 1977); *Doe* v. *Mathews*, 422 F. Supp. 141 (D.D.C. 1976); *Doe* v. *Mathews*, 420 F. Supp. 865 (D. N.J. 1976). Congress has included one or another version of the Hyde Amendment in HEW appropriations measures for four consecutive fiscal years, and there appears to be little likelihood that such funding restrictions will disappear in the near future or will cease to generate further lawsuits.

The constitutional issues raised by the federal and state statutes are identical. If the Court declines to hear these issues and remands to the district court for the entry of a fresh decree (see note 17, *supra*), the appellants (other than the United States) undoubtedly would pursue an appeal to the Seventh Circuit. And if the Seventh Circuit were to affirm, appellants could then exercise their right of appeal to this Court pursuant to 28 U.S.C. 1254(2). If the Seventh Circuit were to reverse, appellees almost certainly would seek further review here. Hence, a decision not to decide the merits of these constitutional issues at this stage, although they have been fully briefed and argued, might succeed only in delaying for a substantial time this Court's ultimate resolution of a recurring question of substantial practical importance. In light of the number of cases already decided on the subject, such a delay would be unlikely to provide the Court with any significant additional assistance in identifying the relevant questions and refining the competing contentions. For these reasons, we believe that the Court should proceed to consider the validity of the Illinois statute even if it

determines that the district court's judgment concerning the federal statute must be vacated for lack of jurisdiction.[20]

**D. The Court Lacks Jurisdiction, on the Present Appeals from the District Court's April 1979 Judgment, to Consider Aspects of the Court of Appeals' Earlier Statutory Decision That Do Not Provide Alternative Grounds on Which to Support the Judgment Under Review**

Appellants in No. 79-4 urge the Court to consider whether the Medicaid Act requires states participating in the Medicaid program to fund all "medically necessary" abortions for which federal contribution is available under the Hyde Amendment (79-4 J.S. 23-25). The court of appeals answered that question affirmatively in February 1979 (J.S. App. 40a-42a).[21] At the same time, the court remanded the

[20] There is some danger, at least in theory, that gratuitous rulings by district courts on the constitutionality of federal statutes will permit unjustified invocations of this Court's appellate jurisdiction to decide questions that ordinarily could not be presented on direct appeal. This has not been a problem in the past; if, as a result of the Court's decision in this case, some difficulty arises in the future, it can be handled adequately at that time. The district court in the present case did not rule on the Hyde Amendment in order to create appellate jurisdiction in this Court; it decided the question because the court of appeals instructed it to do so. The district court was plainly obligated to review the constitutionality of the Illinois statute, and all parties agree that the legal arguments relevant to the validity of the state law also control with respect to the Hyde Amendment.

[21] Appellant in No. 79-5, the state official responsible for administering the Illinois medical assistance programs, has never sought review in this Court of any aspect of the court of appeals' statutory decision.



case for a determination whether appellees were entitled to further relief on constitutional grounds from the abortion funding restrictions imposed by Illinois law.

The district court's judgment on remand is the subject of the present appeals. Neither appellants in No. 79-4 nor any other party sought review in this Court from that portion of the court of appeals' judgment holding the Illinois statute invalid to the extent it refused payment for medically necessary abortions that would be funded by the federal government under the Medicaid Act and the Hyde Amendment. Consequently, appellees contend (Motion to Vacate 25-33), this Court now lacks jurisdiction to review the challenged aspect of the court of appeals' holding. We believe that appellees' jurisdictional argument on this point is correct; in any event, we believe that the Court should refrain from deciding the statutory question presented in No. 79-4 because the issue has essentially been mooted by the recent congressional revision of the Hyde Amendment.

As already discussed (see page 30, *supra*), a proper appeal under 28 U.S.C. 1252 brings "the whole case" before the Court. *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31; *Fusari* v. *Steinberg*, *supra*, 419 U.S. at 387-388 n.13; *United States* v. *Raines*, *supra*, 362 U.S. at 27 n.7. Appellees acknowledge these precedents (Motion to Vacate 29 & n.**) but maintain that the words "whole case" refer only to those questions "passed upon by [a lower federal court] in the process of 'holding an Act of Congress uncon-

stitutional,' * * * or to matters which might provide alternative grounds for affirmance of that decision," or to threshold jurisdictional issues (*id.* at 29-30). Appellees then state that Section 1252 does not confer jurisdiction to review questions decided in a particular case by a court other than the one from which the appeal to this Court is taken. They argue that a construction of Section 1252 that would permit the Court to assert jurisdiction over the statutory question presented in No. 79-4 would mean that, in any appeal from a decision holding an Act of Congress unconstitutional, the Court could "review any final judgments previously rendered in the same case, even if they were entered years before, and never appealed" (*id.* at 30).

While appellees' phrasing of their position may involve some hyperbole, the substance of their position is accurate as applied to this case. To be sure, this Court has ruled that an appeal under Section 1252 "brings the whole case before the Court[, including] * * * issues that might provide alternative grounds for support of the District Court judgment" (*Fusari* v. *Steinberg*, *supra*, 419 U.S. at 388 n.13). But the district court's judgment that the Illinois statute is unconstitutional does not include, either specifically or by necessary implication, any ruling on whether a state participating in the Medicaid program must pay for all medically necessary abortions for which federal funds are available under the Hyde Amendment. That matter was resolved by the court of appeals several weeks before the district



court's decision, and the appellate court's conclusion was simply assumed by the district court in rendering its constitutional ruling. Whatever might have been the outcome of the district court's constitutional inquiry, it would not have changed Illinois' obligation, under the earlier court of appeals holding, to fund all medically necessary abortions for which federal reimbursement is available under the Hyde Amendment.

Thus, the judgment now before this Court specifically states (J.S. App. 23a): "The District Court's previous May 15, 1978 Judgment and its June 13, 1978 Judgment, as modified by this February 15, 1979 Order, remain in force." In addition, the succeeding paragraphs of the court's April 1979 judgment make clear that the court then decided only the constitutionality of "Illinois' restrictive abortion funding policy," a phrase the court defined (J.S. App. 24a) to mean "the policy Illinois adopted pursuant to * * * Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as modified by the District Court Order of February 15, 1979," *i.e.*, the challenged Illinois statute as modified to reflect the court of appeals' holding that, as a participant in the Medicaid program, Illinois is obliged to pay for all medically necessary abortions for which federal contribution is available. The statutory question raised in No. 79-4 is therefore not included within the judgment from which the appeals to this Court were taken. Appellants in No. 79-4 could have sought review of the court of appeals' statutory decision by docketing an appeal under 28 U.S.C. 1254(2) or by filing a petition for a

writ of certiorari under 28 U.S.C. 1254(1). They did not do so, and they cannot now cure their failure by raising the matter on appeal under 28 U.S.C. 1252 from a different judgment resolving different issues.[22]

In any event, the recent congressional revision of the Hyde Amendment for fiscal year 1980 (see page 9, *supra*) has effectively eliminated the practical significance of the statutory question presented in No. 79-4, at least as far as the parties to this litigation are concerned. By deleting the portion of the Hyde Amendment that permitted federal payments for abortions in "those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term," Congress has reduced to one the number of categories in which the court of appeals' decision would compel Illinois, as a Medicaid participant, to pay for abortions that would not be funded under the Illinois statute as enacted by the state legislature. The single remaining category includes only medically necessary abortions "for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service."

In light of the current version of the Hyde Amendment, the statutory issue raised in No. 79-4 is reduced

[22] The jurisdictional statement in No. 79-4 cannot be considered a petition for certiorari to review the Seventh Circuit's judgment on the statutory question. See 28 U.S.C. 2103. In addition to the problems mentioned by appellees (see Motion to Vacate 28 n.*), the "petition" was filed more than 90 days after the court of appeals' judgment and is therefore untimely under 28 U.S.C. 2101(c).



to the question whether Illinois is compelled by Title XIX to pay for medically necessary abortions for persons who are the victims of rape or incest. But none of the appellees in this case has asserted any personal stake in the resolution of this question, and the classes certified by the district court do not explicitly include the victims of rape or incest. See J.S. App. 8a n.6. No indigent pregnant appellee has alleged that she falls in that category of persons denied funding under state law, and no appellee physician has alleged that he or she wishes to perform an abortion for a person falling in that category. The final question presented in the jurisdictional statement in No. 79-4 is therefore not only beyond the bounds of this Court's jurisdiction under Section 1252, but it also has been rendered moot, with respect to the parties in this case, by congressional action occurring since the docketing of these appeals.[23]

[23] If the Court should nevertheless decide to address the question whether Illinois must fund all medically necessary abortions for which federal reimbursement is available under the Hyde Amendment, it should answer the question affirmatively and sustain the decision of the court of appeals. In establishing the Medicaid program in 1965, Congress required participating states to pay, at minimum, for services in five mandatory categories, including inpatient and outpatient hospital services and physicians' services. 42 U.S.C. 1396a(a)(13)(B), (C), 1396d(a)(1)-(5). In light of the importance Congress attached to the provision of services within the mandatory categories (see S. Rep. No. 404, 89th Cong., 1st Sess. 80 (1965); H.R. Rep. No. 213, 89th Cong., 1st Sess. 70 (1965)), the Secretary of HEW has interpreted the Medicaid Act to require participating states to fund medically necessary care falling within those categories. In particular, an HEW regulation precludes denial or reduction of payments, for

medically necessary services falling within any of the five mandatory categories, solely on the basis of "diagnosis, type of illness, or condition." 42 C.F.R. 440.230 (c) (1). The statute and regulation would be violated if a state were to single out medically necessary abortions for exclusion from coverage, because such action by a participating state would constitute a denial of payments based solely on diagnosis (*i.e.*, that an abortion is medically necessary) and condition (*i.e.*, pregnancy).

The statutory requirement that each state Medicaid plan "include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan" (42 U.S.C. 1396a(a) (17) (A)) does not authorize an otherwise prohibited exclusion of therapeutic abortions from coverage. That statutory provision does not override the provision requiring coverage of the mandatory service categories, and its legislative history shows that it was not intended to permit states to refuse payments on the basis of the kind of condition for which treatment is needed or the kind of medically necessary service within any of the five mandatory categories for which benefits are sought. Rather, the statutory reference to "reasonable standards" was designed to afford each participating state a degree of flexibility in determining the coverage of its plan with respect to persons for whom Medicaid assistance is optional, *i.e.*, the "medically needy" (see note 2, *supra*). In particular, a state enjoys considerable latitude under the statute in deciding which groups of persons should be eligible for assistance and what percentage of their income and resources must be expended for medical care before Medicaid benefits become available. See S. Rep. No. 404, *supra*, at 77, 79, 81; H.R. Rep. No. 213, *supra*, at 67, 69, 71.

Recognizing that the stated purpose of the Act is to provide "necessary medical services" (42 U.S.C. 1396), the Secretary has permitted states to place reasonable limits on the amount of coverage (*e.g.*, the number of days of inpatient hospital services) a state plan will provide and also to limit coverage on the basis of medical necessity (42 C.F.R. 440.230; *Beal* v. *Doe*, 432 U.S. 438 (1977)); neither the Medicaid Act nor the Secretary, however, has authorized participating states to eliminate coverage of a particular kind of medically necessary care.



## II

## THE COURT OF APPEALS CORRECTLY DECIDED THAT STATES PARTICIPATING IN THE MEDICAID PROGRAM ARE NOT REQUIRED BY THE MEDICAID ACT TO FUND MEDICALLY NECESSARY ABORTIONS FOR WHICH FEDERAL REIMBURSEMENT IS NOT AVAILABLE BECAUSE OF THE HYDE AMENDMENT

Appellees argued in the district court and the court of appeals that the Medicaid Act requires participating states to pay for medically necessary abortions, even if federal reimbursement for the cost of such services is not available. The court of appeals rejected that argument and remanded for consideration of appellees' constitutional challenge to Illinois' restrictive abortion funding policy. The court of appeals' decision is correct, and resolution of the constitutional questions presented on these appeals therefore cannot be avoided on statutory grounds.[24]

The Medicaid program is a cooperatively funded endeavor of the federal and state governments. *Beal* v. *Doe*, 432 U.S. 438, 440 (1977); cf. *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970); *King* v. *Smith*,

[24] Appellees have filed a petition for a writ of certiorari (No. 79-64) in which they have argued that the court of appeals erred in holding that the Hyde Amendment eliminated whatever statutory obligation states participating in the Medicaid program may have had to fund medically necessary abortions for which federal reimbursement is now unavailable. Unlike the statutory question presented by appellants in No. 79-4 (see pages 38-44, *supra*), this issue is open to review on the present appeals because, if resolved in favor of appellees, it would provide an alternative ground supporting in part the judgment of the district court.

392 U.S. 309, 316 (1968). Financial contribution by both levels of government is the cornerstone of the entire program. The federal government agrees to appropriate funds to enable states to provide medical assistance to needy persons, and the states in turn agree to establish Medicaid plans that satisfy the requirements of the federal statute.[25] The Medicaid Act does not require the states to assume sole financial responsibility for any kind of medical service.[26] As a consequence, the court of appeals did not need

[25] The Medicaid Act provides that the federal government will pay a specified percentage of "the total amount expended * * * as medical assistance under the State plan * * *." 42 U.S.C. 1396b(a)(1). The statute then defines "medical assistance"" as payment for health care (for eligible persons) falling within certain specified categories of services, including the mandatory categories. 42 U.S.C. 1396d(a).

[26] On a few specific occasions, Congress has conditioned a state's participation in the Medicaid program upon its willingness to maintain certain pre-existing state welfare benefits, even though those benefits would not qualify for federal reimbursement. See, *e.g.*, Pub. L. No. 94-585, Section 2(a), 90 Stat. 2901-2902 (state supplementation of Supplemental Security Income benefits under Title XVI of the Social Security Act); Pub. L. No. 93-66, Section 212, 87 Stat. 155 (same); *Vargas* v. *Trainor*, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975); *Oklahoma* v. *Harris*, Civ. No. 78-0475 (D.D.C. Oct. 31, 1979). But Congress has never conditioned a state's participation in the Medicaid program upon its willingness to assume *new* financial obligations in the absence of federal assistance. Moreover, as the court of appeals in the present case observed (J.S. App. 47a n.12), Congress has always used clear and explicit language whenever it has required unilateral state funding of certain social welfare benefits as a precondition for participation in the Medicaid program.



to view the Hyde Amendment as a substantive change in the Medicaid Act (see J.S. App. 44a-50a) in order to conclude that participating states are not obliged under the Act to fund abortions for which Congress has refused to provide federal payments.[27] The court's result could have been reached much more directly simply by following the principle that has always pervaded the operation of the Medicaid Act: states are not obliged by federal law to pay for services for which federal contribution is unavailable. See 42 U.S.C. 1396d(b) (specifying the federal medical assistance percentage for services funded under the Act; no suggestion that some services must be funded entirely by the states); S. Rep. No. 404, 89th Cong., 1st Sess. 83-85 (1965) (describing financing of medical assistance under Title XIX and indicating federal re-

[27] We do not mean to disavow in any way the court of appeals' thorough analysis of the congressional intent underlying the Hyde Amendment or the court's conclusion that the Amendment eliminated the obligation of participating states to fund medically necessary abortions. We intend to suggest only that variation in the required coverage of state Medicaid plans depending on changes in the availability of federal funds is a possibility built into the Medicaid Act itself, and for that reason it may be misleading to characterize the Hyde Amendment as "a substantive change in the law" (J.S. App. 47a n.13). It is perhaps more accurate to say that, in enacting the Hyde Amendment, Congress did not change the Medicaid Act but in fact relied on and used the existing statutory scheme to produce what it believed was a desirable result. The situation presented in this case is thus wholly different from that considered in *TVA* v. *Hill*, 437 U.S. 153, 189-193 (1978), in which the Court was invited to hold that "expenditures authorized under one Act [of Congress] should be interpreted to repeal the substantive provisions of an entirely independent Act" (J.S. App. 48a-49a).

imbursement would be provided for all legitimate state expenditures under an approved Medicaid plan); H.R. Rep. No. 213, 89th Cong., 1st Sess. 72-74 (1965) (same).

The correctness of this view of the federal statute can be demonstrated by considering a hypothetical appropriations measure not specifically addressed to abortion or any other single medical service. If Congress were to pass an HEW appropriations act that barred all federal payments for inpatient hospital services, surely participating states would not be required to maintain their current level of funding for hospital care (or to increase their total payments for such care) as a precondition to receiving federal reimbursement for the other kinds of medical services covered by the Medicaid Act. The Act does not contemplate the imposition of such substantial financial burdens as a price for obtaining federal funds. The statute is not a device whereby the federal government attempts to induce states to fund services that Congress itself is unwilling to support financially. Rather, Title XIX establishes a cooperative program under which the federal government offers to subsidize several comprehensive categories of medical services if the participating states agree to make medical assistance payments on an equally broad basis. If federal monies are not forthcoming for the full range of services included in the Medicaid categories, the states are not compelled nonetheless to undertake full funding responsibility for the abandoned services in order to obtain a share of whatever federal benefits are still available under the Act.



This reasoning comports fully with the legislative history of the Hyde Amendment recounted by the court of appeals in the present case (J.S. App. 45a-49a), the First Circuit in *Preterm, Inc.* v. *Dukakis*, *supra*, 591 F.2d at 128-131, and the Eighth Circuit in *Hodgson* v. *Board of County Commissioners*, *supra*, slip op. 18-24. As the court of appeals observed (J.S. App. 46a), the legislators who have debated the Hyde Amendment over the past four years have always assumed "that when federal funds [are] withdrawn, the states, although free to continue to pay for abortions not falling within the parameters of the Hyde Amendment, [will] refuse to do so." Moreover, no Member of Congress, whether proponent or opponent of the Hyde Amendment, has ever suggested that the restriction of federal appropriations for certain categories of abortions *requires* continued state funding of such medical services (*ibid.*). Such a suggestion would be inconsistent with the structure and history of the Medicaid program.

In sum, the Congresses that have enacted the Hyde Amendment in its various forms have consistently recognized that no amendments to the Medicaid Act itself are necessary to relieve participating states of the obligation to pay for medically necessary abortions that the federal government will no longer fund. The common understanding has been that, from its inception, the Act has never contemplated compelling states to fund medical services for which federal reimbursement is unavailable.

## III

## THE CHALLENGED ILLINOIS STATUTE AND THE HYDE AMENDMENT ARE CONSTITUTIONAL BECAUSE THE STATE LEGISLATURE AND CONGRESS HAD A RATIONAL BASIS FOR TREATING ABORTION DIFFERENTLY FROM OTHER MEDICALLY NECESSARY PROCEDURES

### A. The Constitutional Question Presented in This Case Is Not Affected by the Recent Change in the Hyde Amendment

The district court's decision regarding the constitutionality of Illinois' restrictive abortion funding policy and the related provisions of the Hyde Amendment addressed statutory measures that have since been affected by congressional action. As previously explained (see page 9, *supra*), Congress has recently deleted the portion of the Hyde Amendment that would have permitted the expenditure of federal funds for abortions "in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term." The currently effective funding limitations, therefore, are even more restrictive than those considered in the judgment here on appeal.

This change in the Hyde Amendment, however, does not affect the constitutional question in this case. The district court's reasons for invalidating the approach reflected in the Hyde Amendment for fiscal year 1979 would apply equally to the version of the federal statute now in place. In its present form, as before, the Hyde Amendment (and the Illinois statutory scheme construed to follow it) denies funding



for some medically necessary abortions prior to fetal viability. This, the district court held, is impermissible, because the state's interest in preserving the life of a nonviable fetus cannot rationally outweigh its interest in safeguarding the prospective mother's health. The legal analysis employed as a basis for the district court's constitutional ruling would thus remain unchanged under the current statutory formula. Accordingly, this Court need not defer review in order to afford the district court an opportunity to evaluate the effects of the recent statutory revision.

### B. Legislative Distinctions Between Abortion and Other Medical Procedures Should Be Reviewed Under the "Rational Basis" Test

As the district court recognized (J.S. App. 12a-13a), an equal protection challenge to the restrictions on the use of public monies contained in the Hyde Amendment and the Illinois abortion funding statute must be resolved under the so-called "rational basis" test. Questions concerning the propriety of limiting public assistance to indigent persons for certain medical services do not involve any "fundamental rights" or "suspect classifications" of the kind that warrant stricter judicial scrutiny of legislative distinctions. Cf. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). As this Court said in *Maher* v. *Roe*, 432 U.S. 464, 469 (1977), "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." See also *Poelker* v. *Doe*, 432 U.S. 519, 521 (1977).

The question of compulsory public funding for abortions is thus different from the question whether a state may choose to prohibit abortions altogether. The Court has held that a woman has a fundamental privacy right to decide whether or not to terminate a pregnancy and that, prior to fetal viability, a state's interest in the potential life of the fetus is not sufficiently compelling to justify direct restrictions on the prospective mother's freedom to make that decision. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Colautti* v. *Franklin*, 439 U.S. 379 (1979). But the matter at issue is not whether Illinois may limit a pregnant woman's freedom of choice; the question is only whether the State must provide her with financial assistance, regardless of the nature of her decision.

The difficulty that members of the appellee class of pregnant women may encounter in obtaining abortions is a consequence solely of their indigency, not of governmental restrictions on the circumstances in which such medical services may legally be performed. See *Maher* v. *Roe*, *supra*, 432 U.S. at 474; J.S. App. 11a. Neither Illinois nor the federal government has sought to regulate appellees' behavior directly; they have merely refused to pay for one of several equally permissible options. The state and federal statutes, in short, do not limit the situations in which women may obtain or physicians may perform abortions; they do not penalize women who terminate their pregnancies or physicians who help them do so; they



merely describe the conditions under which public funds will be available to finance the abortion procedure. This distinction is an important one. In the Court's words (*Maher* v. *Roe*, *supra*, 432 U.S. at 475-476) (footnote omitted),

> [t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

*Maher* v. *Roe*, *supra*, and *Poelker* v. *Doe*, *supra*, establish that abortion funding limitations are to be judged in accordance with the "rational basis" test. They must be sustained if the distinction they make between abortion and other medical procedures "rationally furthers some legitimate, articulated [government] purpose * * *." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973), quoted in *Maher* v. *Roe*, *supra*, 432 U.S. at 470. Put another way, statutes like the Illinois law at issue here must be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). See also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312, 314 (1976).

Nothing in this Court's decisions suggests that a different constitutional standard should apply when Congress or a state legislature has drawn a distinction within the category of medically necessary services rather than between one or more "elective" procedures (*e.g.*, nontherapeutic abortions), on the one hand, and medically necessary services generally, on the other. The point remains that public funding for medical treatment—whether that treatment is necessary for health reasons or only "elective"—is not a matter of constitutional entitlement. Statutory classifications among medical services do not involve any constitutionally protected "fundamental rights" or any invidious discrimination on the basis of constitutionally impermissible factors. Legislatures therefore may make whatever such classifications they deem desirable, as long as the classifications are rationally related to some legitimate government interest.

This Court's decision in *Roe* v. *Wade*, *supra*, did not address itself to the states' obligation to assist their citizens in obtaining needed medical care; at least for abortions undertaken before fetal viability, the privacy right recognized in *Wade* did not turn to any extent on whether a woman's decision to terminate her pregnancy was a product of medical necessity or other factors. By the same token, the appropriate standard of equal protection review outlined in *Maher* does not depend on whether a state's funding classifications are based on comparative judgments about the medical justification for different procedures or on an evaluation of separate



factors not necessarily related to the preservation of a patient's health. In either event, the critical consideration is whether the legislature has acted rationally in distinguishing among prospective recipients of public funds for medical care.

### C. Legislative Decisions to Pay for Abortions Only When the Life of the Mother Would Be Endangered by Carrying the Pregnancy to Term Are Rationally Related to Legitimate Government Interests

The Illinois abortion funding statute and the Hyde Amendment (in each of its versions) satisfy the "rational basis" test, because they advance two legitimate legislative concerns: the desire to encourage normal childbirth and to protect the potentiality of human life, and the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. The legislative history of the federal and state provisions demonstrates that these were the concerns that motivated Congress and the Illinois General Assembly to limit the availability of public funds for abortions.

For example, Representative Hyde, the sponsor of the original version of the federal appropriations amendment, stated that the measure was intended "to protect that most defenseless and innocent of human lives, the unborn * * *." 122 Cong. Rec. 20410 (1976). See also *id.* at 27676 (remarks of Sen. Stennis). Senator Buckley, a leading supporter of the amendment, declared that Congress should not permit the expenditure of federal funds for a "procedure that appalls the conscience of a very substantial per-

centage of the American taxpayers." *Id.* at 27675. See also *id.* at 27673 (remarks of Sen. Helms) ("there are millions of Americans * * * who are opposed to the use of their tax dollars to promote [abortion]"); *id.* at 27679 (remarks of Sen. Bartlett) ("I just do not think * * * we should feel we have a right or an obligation to finance abortions, which are simply considered anathema by many, many people in this country"). Similar remarks may be found in the legislative record for virtually every occasion on which Congress has considered the Hyde Amendment in one or another of its forms. See, *e.g.*, 124 Cong. Rec. S16317-S16318 (daily ed. Sept. 27, 1978) (remarks of Sen. Hatch); 124 Cong. Rec. H12516 (daily ed. Oct. 12, 1978) (remarks of Rep. Hyde); 123 Cong. Rec. S18589 (daily ed. Nov. 3, 1977) (remarks of Sen. Helms and Sen. Bartlett); 123 Cong. Rec. H12489-H12490 (daily ed. Nov. 29, 1977) (remarks of Rep. Bauman).[28] Likewise, excerpts from the General Assembly debates on the Illinois statute, reprinted in the Appendix in this Court (A. 42-88), leave no doubt that the proponents of the challenged legislation intended to encourage childbirth and to prevent the use of tax revenues for

[28] Reliance on congressional floor debates for statements concerning the purpose of the Hyde Amendment is necessary because the conference reports and the House and Senate appropriations committee reports on HEW appropriations measures generally have not discussed abortion funding limitations other than to note their inclusion in the pending bill. See, *e.g.*, H.R. Conf. Rep. No. 96-646, 96th Cong., 1st Sess. (1979); H.R. Conf. Rep. No. 96-513, 96th Cong., 1st Sess. (1979).



a purpose that they and a significant portion of their constituents found morally objectionable.

This Court has repeatedly held, and the district court in the present case recognized, that the federal and state governments have an "important and legitimate interest in protecting the potentiality of human life." *Roe* v. *Wade*, *supra*, 410 U.S. at 162; *Beal* v. *Doe*, *supra*, 432 U.S. at 445-446; J.S. App. 15a. Although this interest is not sufficiently compelling prior to fetal viability to justify direct government regulation or prohibition of abortion, "it is a significant state interest existing throughout the course of the woman's pregnancy." *Beal* v. *Doe*, *supra*, 432 U.S. at 446. In *Maher* v. *Roe*, *supra*, 432 U.S. at 478, for example, the Court concluded that a state's strong and important interest in encouraging normal childbirth provides a rational basis for a legislative or administrative decision to subsidize costs incident to childbirth but not those associated with nontherapeutic abortions. See also *Poelker* v. *Doe*, *supra*, 432 U.S. at 520-521 (sustaining a mayor's policy directive prohibiting the performance of abortions in city hospitals except in cases involving "a threat of grave physiological injury or death to the mother"); D—— *R*—— v. *Mitchell*, *supra*, 456 F. Supp. at 615 ("Given the state's strong interests in protecting the potential life of the fetus, encouraging normal childbirth and appropriately using state funds * * *, the life-endangering standard of [the Utah statute] is entirely reasonable"), *Woe* v. *Califano*, *supra*; *Doe* v. *Mundy*, *supra*.

Congress and the Illinois General Assembly have chosen a rational means of furthering their legitimate interest in normal childbirth and discouraging resort to abortion except in the most urgent circumstances. By agreeing to pay the medical expenses of indigent women who carry their pregnancies to term but refusing to pay the comparable expenses of women who undergo abortions (unless their lives are threatened by a continuation of pregnancy or they are the victims of rape or incest), the federal and state governments have created incentives that make childbirth "a more attractive alternative" for persons eligible for publicly-funded medical assistance. See *Maher* v. *Roe*, *supra*, 432 U.S. at 474.[29]

The district court held, however, that a legislature, in making its funding decisions, cannot rationally choose to prefer the potential life of a nonviable fetus

[29] Congress has attempted to encourage childbirth by building similar incentives into other federally-sponsored health programs. See Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Section 608, 92 Stat. 3601; Pub. L. No. 95-555, 92 Stat. 2076; Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481, Title III, 92 Stat. 1597; Department of Defense Appropriations Act, 1979, Pub. L. No. 95-457, Section 863, 92 Stat. 1254; Civil Rights Commission Act of 1978, Pub. L. No. 95-444, Section 3(a), 92 Stat. 1067; International Development and Food Assistance Act of 1978, Pub. L. No. 95-424, Section 104(a), 92 Stat. 946; Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, Section 10, 91 Stat. 1622; Pub. L. No. 95-215, Section 7, 91 Stat. 1507. Thus, the legislative policy of promoting childbirth and discouraging abortion has not been applied only to persons sufficiently needy to be eligible for Medicaid assistance.



over the immediate health needs of a pregnant woman. J.S. App. 15a, 18a. The only justification that the court offered for this view was the assertion that application of the challenged statutory criteria for Medicaid funding of abortions will "increase substantially maternal morbidity and mortality among indigent pregnant women" (*id.* at 17a).[30] This statement merely reflects the undisputed fact that there are competing values at stake in the process of legis-

[30] To some extent at least, the district court's dire predictions concerning the likely practical effect of the Illinois statute and the Hyde Amendment may be based on a misimpression regarding the way in which the statutory criteria will be applied. Appellees' complaint (A. 14) simply defined "medically necessary" abortions as "therapeutic abortions for which [the Illinois law] denies reimbursement * * *." The court of appeals agreed that this set of abortions is not empty, but it acknowledged that the size of the set could vary greatly depending on the way in which the phrase "necessary for the preservation of the life of the woman" is interpreted (J.S. App. 80a-85a). The same observation is appropriate with respect to the Hyde Amendment's exception for cases in which "the life of the mother would be endangered if the fetus were carried to term." The parties did not litigate in the courts below the proper application of the relevant statutory language to one or more particular abortions that a plaintiff woman sought to obtain or a plaintiff doctor sought to perform. Although a definitive statutory construction must await further developments, it is at least possible that public funding would be available under the Illinois statute and the Hyde Amendment if a doctor were to certify that continued pregnancy could lead to complications that would threaten the mother's life. If so, the district court's fears might be alleviated to some degree. In any event, it is unwarranted to *assume* at the present time that a pregnant woman must actually be near death before she can receive Medicaid funds for an abortion.

lative decisionmaking on the availability of Medicaid funds for abortions.

Based on its assessment of the weight that ought to be attached to the protection of a pregnant woman's health, a legislature or a court might well conclude, as a policy matter, that public financial assistance should be made available for all medically necessary abortions sought by indigent women, or at least for all such abortions prior to fetal viability. But that does not mean that any other policy choice is irrational. By contrast to the district court, Congress and the Illinois General Assembly have chosen to assign greater relative weight to the value of encouraging childbirth and preserving potential human life. For this reason, the federal and state governments have made public funds available, not for all medically necessary abortions, but only in circumstances where a continued pregnancy would threaten the woman's life (or where the pregnant woman is a victim of rape or incest).

One may quarrel with this policy choice, and a reviewing court might even conclude that Congress and the state legislature have acted unwisely. But such a conclusion would not imply that the Hyde Amendment and the challenged state statute lack any rational basis. See *Maher* v. *Roe*, *supra*, 432 U.S. at 479-480. Courts may not invalidate duly enacted statutes merely "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955), quoted in *Dandridge*



v. *Williams*, *supra*, 397 U.S. at 484. On the contrary, as this Court admonished in *Maher* (432 U.S. at 479), "when an issue involves policy choices as sensitive as those implicated [here] * * *, the appropriate forum for their resolution in a democracy is the legislature." [31]

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[31] Like the Illinois statute at issue here, a Missouri state regulation limiting the availability of Medicaid funds for abortions has recently been construed to require payment for all abortions for which federal funds will be provided under the Hyde Amendment. *Reproductive Health Services* v. *Freeman*, *supra*, slip op. 6-12. In the same case, the Eighth Circuit held that the Missouri regulation, as so construed, is "irrationally underinclusive in that it generally denies subsidies to indigent women seeking medically necessary abortions but extends subsidies for medically necessary abortions to those indigent women whose pregnancies have resulted from rape or incest." *Id.* at 22. The court of appeals reasoned that "[i]n terms of either protecting fetal life or preserving the patient's health, there is no rational distinction between the woman who wants a medically necessary abortion because of rape or incest and the woman who wants such an abortion simply because she needs it to preserve her health." *Ibid.*

The Eighth Circuit's ruling suffers from the same fundamental defect that characterizes the district court's decision in the present case. Under the guise of applying the "rational basis" test, the court of appeals has substituted its judgment for that of the state officials responsible for administering Missouri's Medicaid program. A legislature or state administrator could rationally conclude that the state interest in fetal life is ordinarily sufficient to outweigh the interest in preserving maternal health but that the interest in fetal life is overborne when the interest in maternal health is combined with the additional interest in helping the victims of rape or incest avoid the need to bear a child conceived as a result of such traumatic events. The court of appeals simply refused to acknowledge the latter interest; indeed, the court failed to recognize any distinction at all between pregnancies resulting from rape or incest and other pregnancies.

By virtue of its strong and legitimate interest in encouraging childbirth, Congress or a state legislature could rationally choose not to fund any abortions. Neither Congress nor the Illinois General Assembly has gone that far. Both bodies have simply described more narrowly than appellees and the district court would like the situations in which other interests outweigh the interest in protecting potential human life and thus justify the expenditure of public funds for abortions. Statutes embodying that policy judgment are not vulnerable to constitutional attack on the ground that similar restrictions have not been imposed on other medically necessary procedures funded under the Medicaid Act.[32] Abortion is different from other medical procedures because no other procedure involves "the termination of a potential human life." *Maher* v. *Roe*, *supra*, 432 U.S. at 480.

[32] In fact, abortion is not the only "medically necessary" service for which federal Medicaid funds are sometimes unavailable to otherwise eligible claimants. Title XIX provides that, for patients between the ages of 21 and 65, inpatient hospital care in institutions for tuberculosis or mental disease is not covered under the Act. 42 U.S.C. 1396d(a)(17)(B). At the same time, the statute does include coverage for outpatient psychiatric or tuberculosis care or in-patient psychiatric or tuberculosis care in a general hospital. Like the Hyde Amendment restrictions on the availability of federal funds for abortions, these statutory provisions permit payments for one kind of medical treatment for a given condition, but not for another kind of treatment for the same condition. The constitutionality of the Medicaid provision dealing with the availability of funds for psychiatric services has been sustained in *Kantrowitz* v. *Weinberger*, 388 F. Supp. 1127 (D.D.C. 1974), aff'd, 530 F.2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976), and *Legion* v. *Richardson*, 354 F. Supp. 456 (S.D.N.Y.), aff'd, 414 U.S. 1058 (1973).

Appellees have attempted (Motion to Vacate 19 n.*) to deny the relevance of *Kantrowitz* and *Legion* to the present case by observing that the care and treatment there involved were of a kind historically provided by state agencies. But the cases are not cited here for the proposition that the reasons for excluding some forms of psychiatric or tuberculosis care from the coverage of the Medicaid Act are the same as those for excluding some medically necessary abortions. The point is that, in structuring the federal medical assistance program, Congress may make distinctions between one form of medically necessary care and another, as long as it has a rational basis for doing so.



This Court has acknowledged that "not all distinction between abortion and other [medical] procedures is forbidden." *Bellotti* v. *Baird*, 428 U.S. 132, 149-150 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 66-67, 80-81 (1976); *Bellotti* v. *Baird*, No. 78-329 (July 2, 1979) (plurality opinion), slip op. 25-26. A legislature could legitimately decide, on the basis of its interest in protecting potential human life, to limit the availability of public funds for abortions but not for other medically necessary procedures. The constitutionality of such a limitation does not depend on whether an abortion is sought before or after the fetus is viable. In either event, the special characteristics of an abortion provide a rational basis for the imposition of funding restrictions not applicable to other medical services. The district court therefore erred in holding that the Hyde Amendment and the Illinois statute are "unconstitutional as applied to medically necessary

abortions prior to the point of fetal viability" (J.S. App. 21a).

## CONCLUSION

The judgment of the district court should be vacated to the extent it declares the Hyde Amendment unconstitutional. The judgment should be reversed to the extent it declares the Illinois abortion funding statute unconstitutional and grants relief against appellant in No. 79-5.

Respectfully submitted.

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JANUARY 1980



## APPENDIX

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 109 of the Joint Resolution making further continuing appropriations for the fiscal year 1980, and for other purposes, Pub. L. No. 96-123, 93 Stat. 926, provides in pertinent part:

> Notwithstanding any other provision of this joint resolution except section 102, none of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service * * *.

Section 210 of the Act Making Appropriations for the Departments of Labor and Health, Education,

and Welfare, and Related Agencies for the fiscal year ending September 30, 1979, and for other purposes, Pub. L. No. 95-480, 92 Stat. 1586, provides in pertinent part:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Chapter 23 of the Illinois Annotated Statutes (Smith-Hurd 1979 Supp.) provides in pertinent part:

> Sec. 5-5. Medical services. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing home services; (5) physicians' services whether furnished in the office, the patient's home, a hospital, a skilled nursing home, or elsewhere; (6) medical care, or any other type of remedial care furnished by licensed practitioners; (7) home health care services; (8) private duty nursing service; (9) clinic services; (10) dental services; (11) physical therapy and related services; (12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in the diseases of the eye, or by an optometrist, whichever the person may select; (13) other diagnostic, screening, preventive, and rehabilitative services; (14) transportation and such other expenses as may be necessary; (15) medical treatment of rape victims for injuries sustained as a result of the rape, including examinations and laboratory tests to discover evidence which may be used in criminal proceedings arising from the rape; (16) any other medical care, and any other type of remedial care recognized under the laws of this State, but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child. The preceding terms include nursing care and nursing home service for persons who rely on treatment by spiritual means alone through prayer for healing.



* * * * *

> The rules and regulations of the Illinois Department shall require that a written statement including the required opinion of a physician shall accompany any claim for reimbursement for abortions, or induced miscarriages or premature births. This statement shall indicate what procedures were used in providing such medical services.

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Sec. 6-1. Eligibility requirements. Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being, plus any necessary treatment, care and supplies required because of illness or disability, shall be given under this Article to or in behalf of persons who meet the eligibility conditions of Sections 6-1.1 through 6-1.6. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

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Sec. 7-1. Eligibility requirements. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article to or in behalf of any person who meets the eligibility conditions of Sections 7-1.1 through 7-1.3, except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

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